Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UNIVERSAL BANCARD SYSTEMS, INC.,
a New York corporation,

Petitioner,

v.

BANKCARD AMERICA, INC., an Illinois corporation,
SAMUEL BUCHBINDER, and PAUL ALPERSTEIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At the first trial in this case, all parties agreed to give the jury an instruction on the Racketeer Influenced and Corrupt Organizations Act (RICO) which referred in its text to "Exhibit A," a list of "alleged racketeering acts . . . outlined as to each Counterdefendant." (App. 41) The RICO claimant tendered a proposed Exhibit A, listing 37 predicate acts alleged. The opposing parties made general objections to Exhibit A, the list of predicate acts alleged, but, prior to the return of the verdict, the opposing parties did not specifically identify for the trial court which of the 37 predicate acts listed were subject to their objections, nor did the opposing parties tender their own proposed Exhibit A. The questions presented are:

1. Whether general objections to a jury instruction, such as the general objections in this case, which do not specifically identify the portions of the jury instruction which are allegedly defective, and which do not inform the trial court how the jury instruction might be cured to the objector's satisfaction, are sufficient under Fed.R.Civ.P. 51.

2. Whether, in a civil action under RICO, general objections to a list of alleged predicate acts to be included in the jury instructions are sufficient under Fed.R.Civ.P. 51 where the general objections are not applicable to every predicate act alleged in the list, and the general objections do not specifically identify which predicate acts alleged in the list are allegedly defective.

3. Whether the general objections in this case to Exhibit A, the list of predicate acts alleged, were sufficient under Fed.R.Civ.P. 51.

PARTIES TO THE PROCEEDING

The names of all of the parties to the proceeding in the United States Court of Appeals for the Seventh Circuit are contained in the caption of the case.

RULE 29.6 LISTING

There are no parent corporations of Universal Bancard Systems, Inc., a New York corporation, and there are no publicly held companies which own 10% or more of the stock of Universal Bancard Systems, Inc., a New York corporation.

The Certificate Of Interest furnished by Bankcard America, Inc., an Illinois corporation, to the United States Court of Appeals for the Seventh Circuit indicated that there are no parent corporations of Bankcard America, Inc., an Illinois corporation, and that there are no publicly held companies which own 10% or more of the stock of Bankcard America, Inc., an Illinois corporation.

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PETITION FOR A WRIT OF CERTIORARI

Universal Bancard Systems, Inc., a New York corporation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1-19) is reported at 203 F.3d 477. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, which granted the new trial (App. 20-22) is unreported. Other opinions of the United States District Court for the Northern District of Illinois, Eastern Division, in this case are reported at 904 F.Supp. 753, and 998 F.Supp. 961.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 1, 2000. On April 27, 2000, the United States Court of Appeals entered an order which denied petitions for rehearing filed by Universal Bancard Systems, Inc., and by Bankcard America, Inc., and which denied a petition for rehearing en banc filed by Bankcard America, Inc.

The statutory provision which confers jurisdiction on this Court to review on a writ of certiorari the judgment in question is 28 U.S.C. §1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 51 of the Federal Rules of Civil Procedure provides as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.
>
> Fed.R.Civ.P. 51.

STATEMENT OF THE CASE

This action was commenced when Bankcard America, Inc. ("Bankcard"), an Illinois corporation, filed a complaint (Document 1-1) against Universal Bancard Systems, Inc. ("Universal"), a New York corporation, for breach of contract. The basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. §1332. (Document 1-1, p. 1) Universal filed a counterclaim (Document 87) which included a claim for breach of contract against Bankcard, and claims against Samuel Buchbinder and

Paul Alperstein, principals of Bankcard, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (18 U.S.C. §1961, *et seq.*) The basis for federal jurisdiction of the counterclaim for breach of contract was diversity of citizenship under 28 U.S.C. §1332 (Document 87, p. 2), and the bases for federal jurisdiction of the RICO counterclaim were federal question under 28 U.S.C. §1331, diversity of citizenship under 28 U.S.C. §1332, and supplemental jurisdiction under 28 U.S.C. §1367. (Document 87, p. 7)

The parties to this case were involved in the credit card industry. The Court of Appeals summarized the economic backdrop for the parties' dispute as follows:

> "Though the average consumer is oblivious to such arrangements, a customer who slaps down her credit card to make a purchase triggers a chain of financial transactions. The merchant usually keeps about 98 percent of the total, with the remaining 2 percent divided between the credit card company (such as MasterCard), the cardholder's bank (the friendly folks who fill your mailbox every day with credit card offers), and the merchant's bank that processes credit card transactions. Credit card processing banks generally contract with independent sales organizations (ISOs), who sign up merchants on behalf of the bank and provide the merchant with the necessary equipment (such as the nifty little machine through which credit cards are swiped). Big ISOs, in turn, often contract with sub-ISOs to do some of this same work of signing up merchants and servicing the accounts. Once the merchant's credit card processing bank gets its share, it pays the ISO its

> cut, and the ISO then pays the sub-ISO its portion (the 'residuals').
>
> At least that's the way it's supposed to work."
>
> *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477, 480 (7th Cir. 2000).

Bankcard was an ISO which in late 1991 entered into contracts with Universal, a sub-ISO. (Document 87, pp. 2-3) By 1993 the parties' relationship had terminated. Bankcard's complaint against Universal alleged that Universal had breached the contracts by failing to provide customer service to the merchants, and by soliciting merchants, who had been customers of Bankcard, on behalf of United Jersey Bank, a credit card processing bank which had no relationship with Bankcard. (Document 1-1, pp. 2-3) Universal's counterclaim for breach of contract maintained that Bankcard "held up merchant applications and delayed and shortchanged Universal on the residuals it was due." (*Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477, 480 (7th Cir. 2000).) As stated by the Court of Appeals, "In Universal's view, Bankcard drove Universal out of business by cutting off the flow of money and then turned a profit by selling the accounts Universal originally had harvested." (203 F.3d 477, 480.) Universal's RICO counterclaim maintained that Buchbinder and Alperstein conspired to conduct and did conduct Bankcard's affairs through a pattern of racketeering activity and violated 18 U.S.C. §1962(a), (b), (c), and (d). (Document 87, pp. 11-12) Universal alleged that Buchbinder and Alperstein devised a scheme to defraud Universal by entering into the contracts with Universal, and "once a critical level of merchant accounts had been

placed, and a residual income stream was derived from said accounts, find[ing] pretexts to withhold residuals payments." (Document 87, p. 19) Universal alleged that Buchbinder's and Alperstein's scheme "was made in contemplation of the fact that once residual payments were withheld, or cut off, [Universal] would be unable to pay [its] sales force and continue as a viable business entity; it would then be only a matter of time until [Universal was] unable to operate as a viable business entity, the merchant accounts and residual income would then be appropriated by [Buchbinder and Alperstein]." (Document 87, p. 19) Universal alleged in its RICO counterclaim that this scheme to defraud, which included the initiation of litigation against the sub-ISO's, was employed by Buchbinder and Alperstein against six other sub-ISO's over an eight-year period. (Document 87, p. 21) Universal alleged that Buchbinder and Alperstein committed 37 predicate acts of mail fraud (18 U.S.C. §1341), wire fraud (18 U.S.C. §1343), and bank fraud (18 U.S.C. §1344) in connection with the pattern of racketeering activity. (Document 87, pp. 10-12, 17-18, Ex. D)

The matter proceeded to a jury trial before the Hon. Brian Barnett Duff. Several jury instruction conferences were held. The parties stipulated (Document 133, p. 5) to a jury instruction on RICO (Document 90) based on the Fifth Circuit pattern jury instruction (transcript, p. 1034). (References to the transcript will be to the transcript of the first trial unless otherwise noted.) (A copy of the agreed RICO jury instruction is set forth in the Appendix hereto. (App. 27-43)) Because the parties agreed to the use of that instruction, there was no dispute at trial that that jury instruction accurately set forth and described

the elements that Universal was required to prove in order to prevail under RICO. With regard to predicate offenses, the jury instruction provided, *inter alia*, as follows:

> "A 'racketeering activity' means an act in violation of the federal mail fraud, the federal wire fraud, or the federal bank fraud statutes. You will be instructed on the law pertaining to these statutes to guide you in determining whether the plaintiff proved by a preponderance of the evidence that BUCHBINDER and/or ALPERSTEIN committed one or more violation [sic] of these statutes. A 'racketeering activity' may also be referred to as a 'predicate offense.' "
>
> (App. 28)

With regard to predicate acts of mail fraud, the jury instruction provided, *inter alia*, that "UNIVERSAL must prove by a preponderance of the evidence that one or more of the Counterdefendants knowingly and willfully devised or intended to devise a scheme to defraud which was substantially the same as the one alleged by UNIVERSAL and that the use of the United States Mail was closely related to the scheme in that one or more of the Counterdefendants either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme." (App. 32) With respect to predicate acts of wire fraud, the jury instruction provided, *inter alia*, that "[t]o establish that wire fraud has been committed, UNIVERSAL must prove by a preponderance of the evidence that the Counterdefendants used the telephone or telegraph for the purpose of executing the scheme to defraud."

(App. 32) The jury instruction provided that "[t]o establish wire fraud, it must be found that when the Counterdefendant performed an act, he knew, or reasonably could foresee, that the telephone or telegraph wires would be used to further a scheme or artifice to defraud." (App. 32-33) With respect to predicate acts of bank fraud, the jury instruction provided, *inter alia*, that "[t]o establish that bank fraud has been committed, UNIVERSAL must prove by a preponderance of the evidence that the Counterdefendants defrauded a financial institution or that they obtained money, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises." (App. 33) The RICO jury instruction also provided:

> [Y]ou may not consider just any racketeering act allegedly committed by BUCHBINDER and/or ALPERSTEIN in violation of one of these statutes as bearing on the question of whether either BUCHBINDER or ALPERSTEIN has committed two or more predicate offenses as a pattern of racketeering activity. In making this determination, you are to consider only those specific racketeering acts alleged by UNIVERSAL against a particular Counterdefendant."
>
> (App. 29)

The jury instruction also provided, "You may consider only those racketeering acts alleged against the particular Counterdefendant by UNIVERSAL in determining whether that Counterdefendant has agreed to commit two acts of racketeering activities as a 'pattern of racketeering activity.' " (App. 40-41) Finally, the jury instruction provided, "These alleged racketeering acts are

outlined as to each Counterdefendant in Exhibit A at the end of these instructions." (App. 41)

At the conclusion of the jury instructions was "Exhibit A: Predicate Acts." (A copy of this exhibit is set forth in the Appendix hereto. (App. 44-50)) This exhibit was not part of the RICO jury instruction to which the parties had agreed. "Exhibit A: Predicate Acts" began by stating that Universal "has alleged the following events to be predicate acts to establish the pattern of racketeering activity through a criminal enterprise (BAI) [Bankcard] in support of the scheme of BUCHBINDER and ALPERSTEIN to defraud UNIVERSAL and others of money and property." (App. 44) There followed a list of 37 predicate acts. Some of the predicate acts in the list repeated from the RICO jury instruction the mental state required for an act to constitute a predicate offense, such as number 17 which provided:

> "17. From June 1987 to February 1988, Buchbinder, knowing that his representations were false and with the intent to deceive Baer in order to misappropriate residual income from merchant accounts sold by Western Bankcard, spoke on various occasions by phone with Baer, misleading him into believing that the delay in payment of residuals were [sic] caused by the processing bank."

(App. 47)

Other predicate acts in the list did not repeat from the RICO instruction the mental state required, such as number 12 which provided:

"12. In or about April 1987, Buchbinder in Skokie, IL, spoke by phone with Roger Baer in California to begin the process of inducing Baer and his company to enter into an Independent Sales Organization agreement with ABC."

(App. 46)

At one of the jury instruction conferences, Judge Duff indicated, "Now, Bankcard objects to Exhibit A in the RICO instruction which outlines the alleged predicate act." (Transcript, p. 1200) The following colloquy subsequently occurred:

"THE COURT: What's your objection?

[Counsel for Bankcard, Buchbinder, and Alperstein]: Because we believe having these come from the Court is giving their evidence. It's not boiled down.

THE COURT: All you need to say is these are the predicate acts alleged.

[Counsel for Bankcard, Buchbinder, and Alperstein]: We object because there is no indication of the level of intent to commit fraud that is necessary for these to be predicate acts under mail fraud and wire fraud statutes.

THE COURT: Well, I think that there is there is [sic] enough for the jury to say well, this was done in furtherance clearly. Where is it? Did I give it back to you?

For example--you can clean it up if you want, but if you say from June--No. 17, and I picked it at random--"From June 1987 to February 1988, Buchbinder, knowing that his representations were false and with the intent to

deceive Baer in order to misappropriate residual income from merchant accounts sold by Western Bankcard spoke on various occasions by phone with Baer misleading him into believing that the delay in payments of residuals were [sic] caused by the processing bank." That's in furtherance of the conspiracy if they believe there was a conspiracy.

. . .

[Counsel for Bankcard, Buchbinder, and Alperstein]: Were all of these things testified to?

THE COURT: Not all of them.

[Counsel for Bankcard, Buchbinder, and Alperstein]: If they weren't, how can they be put in?

THE COURT: Well, then object to them. You haven't objected to any of them. Maybe some of them weren't put in. Take them out. A lot of them were put in. You only need two. But don't give it to me at the last minute."

(Transcript, pp. 1203-1205)

At a subsequent conference following closing arguments, the following colloquy occurred:

"THE COURT: . . . Now, I thought we agreed that you were not going to include these predicate acts in here in the same fashion that you did, but what you have done is you have made it an exhibit. I don't know--I mean an appendix. I have never heard of an appendix being involved in jury instructions before, but it's not a bad idea. Nevertheless, it does ask me to read a very lengthy set of single space things,

37 of them. And they fill 3-1/4 pages of single spaced typing.

Do you want me to read all that? Is that your intention?

[Counsel for Universal]: That was originally, your Honor.

THE COURT: I thought I said to you why did you include all these acts when you only need a few.

[Counsel for Universal]: That's right. Your Honor, we would be happy to pick out a few for you to read.

THE COURT: Do you agree with that, Mr. Hamman [counsel for Bankcard, Buchbinder, and Alperstein]?

[Counsel for Bankcard, Buchbinder, and Alperstein]: That would certainly be preferable to that enormous list.

THE COURT: Well, look at it right now during this break. I'm going to pull them out for you, what you call Exhibit A, and decide what you really want to use. I'll send the appendix in if you want, but I'm not going to read them. . . . "

(Transcript, pp. 1281-1282)

After a short break (transcript, p. 1284), the following colloquy occurred:

"THE COURT: Gentlemen, I appreciate the fact that you have taken the predicate acts Exhibit A that we discussed and you have marked the ones that you would like me to read. You didn't narrow them down very much, you

asked me to read at least half of them, more than half. So that's two pages of single space, I guess, or a page and a half anyway, and we will do it.

But also I would say to you that my--there is some concern that we would be sending something in to the jury room that wasn't read, and Universal says that all of these items are in evidence. Bankcard said that they were not all in evidence. If they were all in evidence, I wouldn't worry about sending it in to the jury room if you both agree. If they're not all in evidence, I think we should know where the objections are and you haven't given me any objections.

Now, it's a civil case, and you can waive anything you want if you want in a civil case. We are not talking about constitutional rights. But I don't want it to be error. But if both sides agree that I should read the ones that are checked and send the exhibit in, I will.

[Counsel for Bankcard, Buchbinder, and Alperstein]: Well, your Honor, we keep our objection to the exhibit or to that listing.

THE COURT: What's that now?

[Counsel for Bankcard, Buchbinder, and Alperstein]: Well, we object that the way it's phrased it's prejudicial. But I think we mentioned that back in chambers.

THE COURT: I've got to know what you want right now.

[Counsel for Bankcard, Buchbinder, and Alperstein]: Right now we would object to sending anything back to the jury that isn't read.

THE COURT: All right, I'll read them all.

Bring them [the jury] in."

(Transcript, pp. 1285-1286)

Subsequently, while reading the instructions to the jury, after reading the agreed RICO jury instruction, Judge Duff called the attorneys to the bench for a sidebar conference, and the following colloquy occurred:

"THE COURT: I want to know what you want to do with all these things [the predicate acts alleged on Exhibit A]. I thought we had agreed that we weren't going to read this. But we did say in the context there that it was here and you said, Mr. Hamman [counsel for Bankcard, Buchbinder, and Alperstein], that you want them all read, is that right?

[Counsel for Bankcard, Buchbinder, and Alperstein]: In light of circumstances, while I object to them I would not require they be read.

THE COURT: What's your feeling?

[Counsel for Universal]: Just those marked are the only ones I want read.

THE COURT: Oh, you want me to read them aloud?

[Counsel for Universal]: Yes.

THE COURT: The ones that are marked.

[Counsel for Bankcard, Buchbinder, and Alperstein]: That's fine, subject to my other objections.

THE COURT: Okay."

(Transcript, p. 1320)

Other than the statements in the colloquys quoted above, counsel for Buchbinder and Alperstein made no attempt to object to Exhibit A, the list of predicate offenses alleged by Universal, prior to the jury returning its verdicts, and counsel for Buchbinder and Alperstein never tendered their own proposed version of "Exhibit A," which was, of course, referred to in the text of the agreed RICO jury instruction. The jury was tendered, *inter alia*, both the agreed RICO instruction and "Exhibit A: Predicate Acts." (Document 90) Prior to the return of the verdicts, Bankcard, Buchbinder, and Alperstein made a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50, which was denied by Judge Duff. (Transcript, pp. 1360-1366)

At the conclusion of the trial, the jury returned verdicts in favor of Universal and against Bankcard on the breach of contract claims and awarded Universal $1,115,000.00 for breach of contract. (Document 97) Judgment was entered accordingly. (Document 96) The jury also returned a verdict in favor of Universal and against Buchbinder under RICO in the amount of $1,115,000.00, and a verdict in favor of Universal and against Alperstein under RICO in the amount of $1,115,000.00. (Document 97) The damages under RICO were trebled pursuant to statute, and judgment was entered in favor of Universal and against Buchbinder in the amount of $3,345,000.00, and in favor of Universal and against Alperstein in the amount of $3,345,000.00. (App. 25-26)

Bankcard, Buchbinder, and Alperstein filed a post-trial motion under Fed.R.Civ.P. 59, renewing their motion for judgment as a matter of law, and requesting a new trial. (Document 99) After the post-trial motion was fully

briefed, the Hon. Brian Barnett Duff was assigned to inactive status for health reasons (Document 147, attached affidavit, p. 2), and the case was ultimately reassigned to the Hon. Richard A. Posner, the Chief Judge of the United States Court of Appeals for the Seventh Circuit, sitting as a District Judge by designation. (Document 150) Judge Posner denied the renewed request for judgment as a matter of law, but granted the motion for a new trial. (App. 20-22) With respect to the renewed motion for judgment as a matter of law, Judge Posner ruled that the evidence on the RICO claim was sufficient to go to the jury. With respect to the motion for new trial, as stated by the Court of Appeals in its opinion in this case:

> "Though Judge Posner said there were additional errors at the first trial, he identified three in ordering a new trial: transmitting to the jury exhibits that had not been admitted in evidence; improper receipt of testimony about settlement talks; and faulty instructions to the jury on the RICO claim."
>
> 203 F.3d 477, 481.

Prior to the second trial, Bankcard disclaimed any intention of obtaining damages or other relief on its breach of contract claim, and, therefore, Bankcard's claim was dismissed without prejudice, and the case was "recaptioned Universal as plaintiff versus Bankcard and its two individual officers as defendants." (Document 192, p. 1) Following the second trial, the jury returned a verdict in favor of Universal and against Bankcard on the breach of contract claim in the amount of $4,090,668.00,

and returned verdicts in favor of Buchbinder and Alperstein and against Universal under RICO. (Document 209) Judge Posner subsequently granted Bankcard's motion under Fed.R.Civ.P. 50 for judgment as a matter of law on the breach of contract claim based on the theory that Universal had failed to prove any damages resulting from the breach of contract (Document 210, 211), and Judge Posner entered judgment against Universal on all claims. (Document 212)

Universal's post-trial motion under Fed.R.Civ.P. 59 was denied (Document 226), and Universal appealed. (Documents 236, 239, 241) Bankcard cross-appealed. (Document 237)

On appeal, Universal maintained, *inter alia*, that Judge Posner had erred in granting a new trial, and Universal requested the Court of Appeals to "reinstate the jury's 1996 verdict in its entirety." (Universal's brief, p. 50) The Court of Appeals agreed, in part, and disagreed, in part. The Court of Appeals held that the claimed error in transmitting to the jury exhibits that had not been admitted into evidence was waived with respect to certain exhibits, and, with respect to the remainder of exhibits, was harmless and did not merit the ordering of a new trial. (203 F.3d 477, 481-483.) The Court of Appeals also held that Judge Duff had not improperly received testimony about settlement talks. (203 F.3d 477, 483-484.) But the Court of Appeals held that Buchbinder and Alperstein had not waived their claim of error relating to the jury instructions under RICO, and that those jury instructions were improper because "[s]ome of the 37 predicate acts lacked any evidentiary support," and "[o]ther predicate acts, such as placing a telephone call to

solicit business or filing a lawsuit, did not charge an action that is indictable under RICO." (203 F.3d 477, 485.) The Court of Appeals stated, "On only the first of the 37 predicate acts did Judge Duff instruct the jury that the particular act had to have been done with an intent to defraud to qualify as a predicate act." (203 F.3d 477, 485.) The Court of Appeals held that the errors in "Exhibit A: Predicate Acts" required a new trial of the RICO claim. (203 F.3d 477, 485.) The Court of Appeals held that "[b]ecause the RICO instruction error at the first trial affected only the RICO claims, however, the new trial should have been limited to that part of the case." (203 F.3d 477, 485.) The Court of Appeals reinstated the verdict of the jury at the first trial in favor of Universal and against Bankcard in the amount of $1,115,000.00 on the breach of contract claim, but refused to reinstate the verdict of the jury at the first trial under RICO. (203 F.3d 477, 487.) The Court of Appeals held that the second trial on the breach of contract claim was a nullity because it should not have occurred, and affirmed the result of the second trial on the RICO claim. 203 F.3d 477, 487.

In the Court of Appeals, Universal maintained (Universal's brief, p. 29), as it had in the district court (Document 131, pp. 24-25), that Buchbinder and Alperstein had waived any objection to the RICO jury instructions. In the Court of Appeals, Universal maintained that Buchbinder and Alperstein "failed to delineate which of the listed predicate acts they objected to." (Universal's brief, p. 30.) The Court of Appeals rejected that contention, holding that Judge Duff's RICO jury instructions were given "[o]ver Bankcard's objection." 203 F.3d 477, 484.

REASONS FOR GRANTING THE PETITION

Rule 10 of this Court sets forth a list which "indicate[s] the character of the reasons the Court considers" in connection with a petition for a writ of certiorari. Two of the reasons listed are applicable to this case. First, the United States Court of Appeals in this case sanctioned a departure by the district court "so far . . . from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Second, the United States Court of Appeals in this case "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

For over 100 years, and since these questions were first considered, it has been the accepted and usual course of judicial proceedings to require objections to jury instructions to specifically identify the portions of the charge which are allegedly defective so that the trial court is informed how the charge might be cured to the objector's satisfaction. For example, in *Beaver v. Taylor*, 93 U.S. 46 (1876), the plaintiff excepted "to so much of the charge of the court as given, as [was] in conflict with and variant from" the jury instructions proposed by the plaintiff. (93 U.S. 46, 53.) This Court held that that exception to the jury instructions was not sufficiently specific to preserve the issue for review, stating:

> "An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained. [Citation omitted.] It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and

> the charge, to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so. [Citation omitted.] An exception in the form we are considering entirely defeats that object."
>
> 93 U.S. 46, 55.

In *McDermott v. Severe*, 202 U.S. 600 (1906), this Court was called upon to consider, among other things, a general exception to a jury instruction which listed the different elements of damages to which the plaintiff would be entitled should the jury decide liability in his favor. This Court held that the general exception was insufficient and stated "it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous." (202 U.S. 600, 610.) This Court held that "[i]f the defendant wished the charge modified" insofar as it might apply to wages earned by the plaintiff during his infancy, "he should have called the attention of the court directly to this feature," and that "[i]t would be very unfair to the trial court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal." (202 U.S. 600, 611.) See also *Block v. Darling*, 140 U.S. 234, 238-239 (1891); *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). Moreover as stated in *Beaver v. Taylor*, 93 U.S. 46 (1876), if a "series of propositions contained" in the jury instructions "is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained." 93 U.S. 46, 54.

Finally, to be considered, exceptions to jury instructions were required to be made "while the jury were at the bar" (*Phelps v. Mayer*, 56 U.S. 160, 161 (1853)), and an exception raised for the first time in a motion for new trial came too late. *Reagan v. Aiken*, 138 U.S. 109, 113-114 (1891).

These long-standing principles governing the course of judicial proceedings were preserved with the adoption of the Federal Rules of Civil Procedure. Although Rule 46 has made formal exceptions to rulings of the court unnecessary (Fed.R.Civ.P. 46), Rule 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to* and the grounds of the objection." (Emphasis added.) (Fed.R.Civ.P. 51.) This Rule has been routinely construed in accordance with this Court's opinions cited above. For example, in *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989), the Court had the following to say about the requirement of Rule 51 that the matter objected to be stated "distinctly":

> "This is not a mere technical requirement serving no useful end. Trial judges are not mind readers. If there is a problem with the instructions, the judge must be told *precisely* what the problem is, and as importantly, what the attorney would consider a satisfactory cure." (Emphasis in original.)
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> (874 F.2d 1, 5.)

See also *Dunn v. HOVIC*, 1 F.3d 1371, 1379 (3d Cir. 1993), *cert denied*, 510 U.S. 1031 (1993); *Hardware Mutual Insurance Co. v. Lukken*, 372 F.2d 8, 13 (10th Cir. 1967).

In this case, the successor district judge, the Hon. Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, sitting as a district judge by designation, in ruling on the motion for new trial, so far departed from the above-described accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power where, as here, the departure was sanctioned by the Court of Appeals. In this case, the general objections that had been made to Judge Duff to Exhibit A, the list of predicate acts alleged by Universal, to the effect that there was no indication of the mental state required for items to be predicate acts under the mail fraud and wire fraud statutes, and that some of the 37 predicate acts alleged were not supported by the evidence, were held by Judge Posner to have been sufficient even though Buchbinder and Alperstein had never identified to Judge Duff the specific predicate acts which they thought were defective, the objections were not applicable to all 37 predicate acts on the list, and Buchbinder and Alperstein had never offered their own version of Exhibit A, the list of predicate acts alleged by Universal. In this regard, it should be recalled that the jury instruction on RICO, which the parties had agreed should be given, referred in its text to Exhibit A, a list of alleged racketeering acts, so Judge Duff was required to give the jury a list of predicate acts entitled Exhibit A in order for the jury instructions to make sense. Judge Posner held that Buchbinder's and Alperstein's general objections had been sufficient even though Judge Duff had informed counsel for Buchbinder and Alperstein,

"You haven't objected to any of them [the specific predicate acts alleged]" (transcript, p. 1204) and had told counsel for Buchbinder and Alperstein, "I've got to know what you want right now" (transcript, p. 1286). Even in response to those admonitions, counsel for Buchbinder and Alperstein had not requested the deletion or modification of any specific predicate act listed in Exhibit A. Judge Posner's ruling that Buchbinder's and Alperstein's objections were sufficient under these circumstances constitutes a gross departure from the accepted and usual course of judicial proceedings, and, as a result, a new trial was ordered which should not have been ordered. Moreover, the Court of Appeals, in reviewing the ruling of its Chief Judge, sitting as a district judge by designation, sanctioned this departure from the accepted and usual course of judicial proceedings, affirming the grant of the new trial on the RICO claims, rejecting Universal's argument that Buchbinder and Alperstein had not properly preserved the issue for review, and stating that Judge Duff's RICO instructions were given "[o]ver Bankcard's objection." 203 F.3d 477, 484.

Moreover, the decision of the Court of Appeals in this case, which rejected Universal's argument that Buchbinder and Alperstein had waived any objection to the RICO jury instructions by failing "to delineate which of the listed predicate acts they objected to" (Universal's brief, p. 30), was in conflict in principle with other decisions of the Courts of Appeals applying Rule 51 of the Federal Rules of Civil Procedure, such as *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 5, which held that "[i]f there is a problem with the instructions, the judge must be told *precisely* what the problem is, and, as

importantly, what the attorney would consider a satisfactory cure." (Emphasis in original.) (See also *Dunn v. HOVIC*, 1 F.3d 1371, 1379 (3d Cir. 1993), *cert. denied*, 510 U.S. 1031 (1993); *Hardware Mutual Insurance Co. v. Lukken*, 372 F.2d 8, 13 (10th Cir. 1967).) The decision of the Court of Appeals in this case would have required Judge Duff to usurp the role of an advocate, analyzing each of the 37 predicate acts alleged to determine which could arguably be considered subject to the general objections stated by Buchbinder and Alperstein. Review by this Court is warranted to maintain the proper balance in our adversary system of justice.

Finally, it should be noted that the Court of Appeals in this case did not invoke the "plain error" doctrine to relax the requirements of Federal Rule of Civil Procedure 51. In fact, if the Court of Appeals had correctly held that the general objections of Buchbinder and Alperstein had been insufficient, the Court of Appeals would not have invoked the "plain error" doctrine because the Seventh Circuit has held that, with respect to jury instructions, the plain error doctrine is not a viable concept in civil litigation. (*Deppe v. Tripp*, 863 F.2d 1356, 1361-62, 1367 (7th Cir. 1988).) Moreover, invocation of any "plain error" doctrine would have been entirely inappropriate in this case because the purported errors in the jury instructions would not have had any effect on the outcome of the case. Although some of the predicate acts listed in Exhibit A did not set forth the mental state required for a violation of the mail fraud or wire fraud statutes, the agreed RICO jury instruction informed the jury that a "racketeering activity," also referred to as a "predicate offense," "means an act in violation of the federal mail fraud, the

federal wire fraud, or the federal bank fraud statutes" (App. 28), and the agreed RICO jury instruction set forth the mental states required for violation of those statutes. (App. 30-33) Moreover, Exhibit A, itself, began by stating that Universal "has alleged the following events to be predicate acts to establish the pattern of racketeering activity through a criminal enterprise (BAI) [Bankcard] in support of the *scheme* of BUCHBINDER and ALPERSTEIN to *defraud* UNIVERSAL and others of money and property." (Emphasis added.) (App. 44) Under these circumstances, the jury would not have been misled by Exhibit A with respect to the mental state required for the predicate acts. Moreover, the absence of evidentiary support for one or more of the 37 predicate acts listed would not have prejudiced Buchbinder or Alperstein, or have confused the jury. The jury was instructed that Exhibit A was a list of predicate acts "alleged" by Universal. (App. 44) If there was no evidentiary support for one or more of the 37 predicate acts listed, the jury presumably did not find that those predicate acts had been proved. As Judge Posner, himself, wrote in *S. A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 50 F.3d 476 (7th Cir. 1995):

> "When an instruction is given to which no evidence correspondends, the likely consequence is that the jury ignored it. The error in giving it is therefore presumed to have been harmless."
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> (50 F.3d 476, 481.)

Accordingly, this case would not have been an appropriate one for invocation of any "plain error" doctrine.

CONCLUSION

For the reasons stated herein, the Petitioner, Universal Bancard Systems, Inc., respectfully requests this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-2528, 98-2529, and 98-2530

BANKCARD AMERICA, INC.,

Plaintiff-Appellee/Cross-Appellant,

v.

UNIVERSAL BANCARD SYSTEMS, INC.

Defendant-Appellant/Cross-Appellee,

and

SAMUEL BUCHBINDER and PAUL ALPERSTEIN,

Counter-Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1969--**Richard A. Posner,**
Chief Circuit Judge Sitting by Special Designation.

ARGUED SEPTEMBER 29, 1999--DECIDED FEBRUARY 1, 2000

Before HARLINGTON WOOD, JR., MANION, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Football fans know the sickening feeling: your team scores a big touchdown but then a penalty flag is tossed, wiping out the play. Universal Bancard Systems, Inc. knows that feeling firsthand after seeing not one, but two big touchdowns called back. The

referee who waved off the first--a $7.8 million verdict--and then the second--a $4.1 million jury verdict after a second trial--was the Honorable Richard A. Posner, the circuit's chief judge who in this case was wearing, by designation, the robe of a district judge.[1] Like the instant replay official, we now review the decisions of our colleague--using the voluminous record rather than a television monitor and recognizing that our review in 1999 of a case that began in 1993 is a far cry from instant.

It's obvious that Universal Bancard Systems, Inc. fared wonderfully in this litigation with juries, but terribly with Judge Posner. At the first trial, in 1996, a jury found that Bankcard America, Inc. breached its contract with Universal and that Bankcard founders Samuel Buchbinder and Paul Alperstein violated RICO, the Racketeering Influenced and Corrupt Organizations Act. The jury awarded Universal $1,115,000 for the breach of contract and $1,115,000 for each of the two RICO claims. The RICO damages were trebled, bringing Universal's total award to $7.8 million. When District Judge Brian Barnett

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[1] It is a testament to the dedication of Chief Judge Posner that he volunteered to sit in the district court and hear this case which, at the time, needed the guiding hand of a new judge. Judge Posner, of course, carries a full load of cases on this court. He also discharges a multitude of administrative duties as the circuit's chief judge. But that's only part of what he does. He has written more books than many people read in a lifetime. On top of all this, in his spare time he is working as a court-appointed special mediator in the government's blockbuster antitrust suit against Microsoft. Obviously, Judge Posner has more on his plate than a long-haul trucker working an "all you can eat" buffet line. It is a tribute to Judge Posner's talent that he handles his many roles with such vigor, brilliance, and panache.

Duff, who presided over the first trial, moved to senior status, the case was reassigned to Judge Posner under Local Rule 2.30(e). Citing errors at the first trial, Judge Posner threw out the verdict and ordered a new trial, at which he presided.

At the second trial, in 1998, the jury found in favor of Buchbinder and Alperstein on the RICO claims, but again concluded that Bankcard breached the contract, this time awarding Universal $4.1 million on that claim. But Judge Posner got rid of that verdict, too, entering judgment for Bankcard because the evidence of damages was insufficient. That left Universal, after nearly a decade of litigation, with nary a penny, an outcome they appeal.

Though the average consumer is oblivious to such arrangements, a customer who slaps down her credit card to make a purchase triggers a chain of financial transactions. The merchant usually keeps about 98 percent of the total, with the remaining 2 percent divided between the credit card company (such as MasterCard®), the cardholder's bank (the friendly folks who fill your mailbox every day with credit card offers), and the merchant's bank that processes credit card transactions. Credit card processing banks generally contract with independent sales organizations (ISOs), who sign up merchants on behalf of the bank and provide the merchant with the necessary equipment (such as the nifty little machine through which credit cards are swiped). Big ISOs, in turn, often contract with sub-ISOs to do some of this same work of signing up merchants and servicing the accounts. Once the merchant's credit card processing bank gets its share, it pays the ISO its cut, and the ISO then pays the sub-ISO its portion (the "residuals").

At least that's the way it's supposed to work. Things never are quite so tidy in real life, of course, and in this case a contract signed in late 1991 by ISO Bankcard and sub-ISO Universal already had come asunder by early 1993. Bankcard went to court first, suing Universal for breach of contract. Bankcard accused Universal of providing inadequate customer service to the merchants and of converting accounts Universal originally had signed up with Bankcard to United Jersey Bank, another ISO with whom Universal signed a more favorable deal shortly after Universal had entered into the contract with Bankcard. (As a sub-ISO to Bankcard, Universal was not forbidden from signing up merchants with other ISOs, but Universal was not supposed to steer away accounts it already had placed with Bankcard.)

Universal counterclaimed against Bankcard for breach of contract and RICO violations. Universal said Bankcard held up merchant applications and delayed and shortchanged Universal on the residuals it was due. In Universal's view, Bankcard drove Universal out of business by cutting off the flow of money and then turned a profit by selling the accounts Universal originally had harvested. The RICO claims were based on the allegation that Bankcard had crushed other sub-ISOs through the same calculated tactics.

To be sure, the first trial was not an example of the American judicial system at its finest. The lawyers' questions to witnesses often were lengthy, incoherent, leading, and sounded more like testimony than inquiry. The presentation of the facts was jumbled. Objections and sidebars almost constantly interrupted the proceedings, leaving the jury cooling its heels on the sidelines while

the attorneys and Judge Duff quibbled, usually about issues that should have been resolved long before. The admission of exhibits was handled carelessly. Despite all the rough edges, however, having a jury of ordinary folk listen and watch while lawyers question witnesses, introduce documents, and present arguments is, for better or worse, how this country resolves business disputes like this one that the parties cannot solve themselves. In the end, the jury slogged through it all and returned a favorable verdict for Universal. The trial was far from perfect, but imperfection is not what triggers a new trial. A new trial is granted if the verdict is against the manifest weight of the evidence or if a prejudicial error occurred. Even if errors occurred, no new trial is required if the errors were harmless. *Romero v. Cincinnati Inc.*, 171 F.3d 1091, 1096 (7th Cir. 1999).

Usually we review a district court's grant of a motion for a new trial for abuse of discretion. *McClain v. Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998).[2] Customarily, however, this issue arises when the same judge who presided over a trial orders a new trial

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[2] When the decision on whether to grant or deny a new trial depends on the evidence, appellate courts sometimes grant less deference to the trial court when a new trial has been ordered than when a new trial has been denied. *See, e.g., Brady v. Fort Bend County*, 145 F.3d 691, 713 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 873 (1999); *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 363 (3d Cir. 1998); Hutchinson v. Stuckey, 952 F.2d 1418, 1420-21 (D.C. Cir. 1992). Here, however, there was no such second-guessing. In ordering a new trial Judge Posner was not disagreeing with the first jury's verdict, but determined that there were prejudicial flaws in the evidence allowed to reach the jury and in the instructions given to the jury.

after determining that the evidence was insufficient to support the jury's verdict. In this case, by contrast, the district judge who presided over the trial was replaced by an appellate judge, sitting by special designation in the district court, who reviewed the cold record and ordered a new trial because he thought the original trial judge erred in admitting evidence and instructing the jury.

On appeal, we give plenary review to a district court's interpretations of law, but we generally give deference to a district court's assessment of facts. But that neat capsulization of the standard of review is not a good fit in this case. Because Judge Posner did not preside over the first trial, he enjoyed no special advantage in determining credibility and gauging the evidence--he read the record, just as we have now done. "The problem of the successor judge . . . is that one person hears the testimony and another person makes the factual findings without having seen or heard the witnesses. . . . Deference to such findings, by a district court or an appellate court, would be misplaced in such a case." *Henry A. Knott Co. v. Chesapeake and Potomac Tel. Co.*, 772 F.2d 78, 85 (4th Cir. 1985). *See also Youakim v. McDonald*, 71 F.3d 1274, 1282 (7th Cir. 1995); *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 908 (7th Cir. 1995). *But see United States v. Soto*, 48 F.3d 1415, 1420-21 (7th Cir. 1995); *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997); *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996). As we see it, to the extent Judge Posner's order of a new trial was based on the law, we review it *de novo*; to the extent the order was based on the facts, deference is not warranted because of the unique circumstances of this case.

Though Judge Posner said there were additional errors at the first trial, he identified three in ordering a new trial: transmitting to the jury exhibits that had not been admitted into evidence; improper receipt of testimony about settlement talks; and faulty instructions to the jury on the RICO claim. Universal challenges all of these reasons on appeal.

Of the 43 exhibits that went to the jury room at the close of the trial, 24 had not been admitted into evidence during the trial. At the time Judge Duff decided which exhibits to send to the jury, however, Bankcard objected to only four exhibits. Judge Duff overruled Bankcard's objections after being told by Universal's counsel that the four exhibits were admitted. Actually, one of the exhibits to which Bankcard objected had been admitted into evidence, but the other three had not.

Bankcard waived its objection to 21 of the 24 exhibits by failing to object at the time Judge Duff was making his decision--the time when the problem could have been avoided. Bankcard wails that the trial transcript was not available at the time and that Universal's counsel erroneously assured and reassured Bankcard and Judge Duff that all 43 of the exhibits had been admitted at trial. The inaccurate statements by Universal's counsel, however, although typical of the slipshod work in this case, do not excuse Bankcard's sleeping at the switch. Judge Duff conferred with the lawyers about what exhibits should be transmitted to the jury on the morning after testimony in the 2-week trial concluded. Trial transcripts generally are not instantly available and their absence does not excuse Bankcard's failure to keep track of what was going on at the trial. Bankcard was silent when it mattered and now

says, "Gee, we finally got around to checking the trial transcripts and it turns out the jury received some stuff it shouldn't have, so let's have a whole new trial and negate the 2 weeks of time that the judge, clerk, court reporter, bailiffs, jurors, witnesses, attorneys, and parties spent on the first trial." The point of the waiver rule is to raise objections and provide the trial judge with information before a mistake has occurred. Without this rule, litigants would sit on their hands, wait to see the result of the litigation, and then if the outcome is unfavorable come back and complain about a problem that could have been avoided.

Our review of the exhibits that passed to the jury without objection is confined to a glance for plain error, a review of only limited expanse. *Wilson v. Williams*, 161 F.3d 1078, 1090 (7th Cir. 1998); *Karazanos v. Madison Two Assoc.*, 147 F.3d 624, 629 (7th Cir. 1998); *Stringel v. Methodist Hosp. of Indiana, Inc.*, 89 F.3d 415, 421 (7th Cir. 1996); *Maul v. Constan*, 928 F.2d 784, 787 (7th Cir. 1991); *Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240, 243 (7th Cir. 1989); *Deppe v. Tripp*, 863 F.2d 1356, 1360-61 (7th Cir. 1988). To prevail under the plain error doctrine, the party that waived the issue in the trial court must show that exceptional circumstances exist, substantial rights will be affected, and a miscarriage of justice will result. *Wilson*, 161 F.3d at 1090. In this case there was no demonstration of exceptional circumstances or of a miscarriage of justice. The 21 exhibits that should not have gone to the jury, but to which Bankcard failed to make a timely objection, consisted mostly of innocuous letters, boilerplate contract language, meaningless fax cover sheets, and pages of cryptic business records.

The only documents that might have placed Bankcard in a bad light were a letter accusing Bankcard's personnel of being rude and sometimes threatening and letters haggling over whether Bankcard was paying Universal the proper amount of residuals, whether Bankcard was wrongfully charging merchants an annual $25 fee, and whether Universal was supposed to be providing service to certain merchants. All of these documents were cumulative of testimony given during the trial and of other documents that were properly admitted into evidence and transmitted to the jury. In addition, though none of these 21 documents actually were admitted into evidence, none of them ever were ruled inadmissible either, and all of them probably would have been admitted upon request. *Cf. Carson v. Polley*, 689 F.2d 562, 571 (5th Cir. 1982) (trial court properly ordered new trial after jury received exhibits that had been ruled inadmissible). Though submitting these exhibits to the jury was a mistake, it was not plain or prejudicial error that warranted a new trial.

Bankcard preserved its objection to three documents that were not admitted into evidence but were provided to the jury. One letter, from Universal senior vice-president Paul E. Albert to Bankcard's Buchbinder, said the two parties had agreed merchants should not have to pay Bankcard an annual $25 fee. Another letter from Albert to Buchbinder complained that Bankcard was failing to deposit certain merchant funds quickly enough and demanded that Bankcard retract a "warning" to Universal. The third letter, from Bankcard's Alperstein to Universal's Albert, apologized for a delay in paying residuals and blamed the delay on the processing bank's tardiness

in providing that month's information to Bankcard. All of these documents would have been admissible upon request and duplicated extensive trial testimony in which various witnesses complained about how Universal was treated by Bankcard. Bankcard protests that it never had a chance to explain these exhibits, but its side of the story on these issues was thoroughly presented at trial. When unapproved material reaches the jury, the trial court must decide whether there is a reasonable possibility the material altered the jury's verdict. *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1143 (7th Cir. 1992). Though turning these documents over to the jury was sloppy, the mistake was harmless and did not, in our view, merit the ordering of a new trial.

The next issue involves Rule 408 of the Federal Rules of Evidence, which forbids the admission of statements made during settlement negotiations to prove liability or the lack of liability. The rule does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness. Because settlement talks might be chilled if such discussions could later be used as admissions of liability at trial, the rule's purpose is to encourage settlements. *See Winchester Packaging, Inc. v. Mobil Chem. Co.*, 14 F.3d 316, 320 (7th Cir. 1994); *Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982).

Under the Bankcard-Universal contract, for one year after the termination of the contract Universal was forbidden to steer merchants it had signed up to Bankcard competitors. Bankcard terminated the contract in March 1993. In the next few months Universal rolled over a

number of accounts to United Jersey Bank, one of Bankcard's competitors with whom Universal also had a contract. Bankcard claimed that Universal thereby breached the contract and that Universal should not be allowed to recover on its breach of contract counterclaim because it had failed to comply with all material terms of the contract. Universal, however, said that it rolled over the accounts at a time when it thought it had reached a settlement with Bankcard that allowed the rollovers. Of course, no settlement was ever made final or this case would not be before us. Judge Duff initially thought Rule 408 should bar evidence that Universal thought it had reached a settlement that allowed it to convert the accounts before the one-year ban expired. Upon further consideration, however, Judge Duff allowed in the evidence to explain why Universal had rolled over the accounts. Judge Duff warned Universal not to go into the terms of the purported settlement and not to use the terms "negotiation" or "settlement."

Richard Rothberg, Universal's president, testified that he thought it was "okay" to convert certain merchant accounts from Bankcard to United Jersey Bank during the one-year period because he "was led to believe that based upon the discussions that had ensued with Mr. Hamman [Bankcard's attorney] and Mr. Jacobs [Universal's attorney at the time] that these accounts were ours to move over, that there was an understanding. When I was told that the arrangements between the two of them had changed, that there was a change of heart on the side of ABC [Bankcard], we ceased to do this anymore because it was going back into a litigation situation." Bankcard filed suit in April 1993, was granted its motion to dismiss the

case in May 1993 while settlement talks were underway, and was granted its motion to reinstate the case in June 1993 after the settlement talks broke down. Rothberg testified that Bankcard "dropped the lawsuit" and then later "decided to go forward with the lawsuit and there was no agreement reached in the final stages."

In closing argument, Bankcard's counsel said there never was any "agreement" and that it was a "blatant breach of contract" for Universal to go "out ahead early" and convert the merchant accounts. During rebuttal, Universal's counsel said: "You heard in the testimony that there was a suit that was filed. This suit was filed, and this suit was dismissed voluntarily by BAI [Bankcard], and later it was refiled. It was after the--after the conversations going on among the attorneys in which this suit was dismissed voluntarily that Mr. Rothberg, as he had testified, came to the understanding that it was okay for him to take those accounts and roll them over or convert them, which he did at that time. And he also testified that when he was informed by his attorney that no, that was a misunderstanding, now they were going to refile the suit and they were going to go on with the litigation, he stopped."

Rule 408 is not an absolute ban on all evidence regarding settlement negotiations. The rule permits evidence that is otherwise discoverable or that is offered for a purpose other than establishing liability. Courts have admitted evidence of offers or agreements to compromise for purposes of rebuttal, *see, e.g., Freidus v. First Nat'l Bank*, 928 F.2d 793 (8th Cir. 1991); for purposes of impeachment, *see, e.g., County of Hennepin v. AFG Indus.*,

Inc., 726 F.2d 149, 153 (8th Cir. 1984); to show the defendant's knowledge and intent, *see United States v. Hauert*, 40 F.3d 197, 199-200 (7th Cir. 1994); to show a continuing course of reckless conduct and negate the defense of mistake, *see Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1362-66 (10th Cir. 1987); and to prove estoppel, *see Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 294 (2d Cir. 1999).

It would be an abuse of Rule 408 to allow one party during compromise negotiations to lead his opponent to believe that he will not enforce applicable time limitations and then object when the opponent attempts to prove the waiver of time limitations. *See* Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5312, at 273 n.5 (1980). Similarly, it would be an abuse of Rule 408 to let Bankcard lull Universal into breaching the contract and then prevent Universal from explaining its actions because the lulling took place around the settlement table. Rothberg's testimony was admitted to show his state of mind and to explain why Universal converted accounts. In hindsight, Universal could have avoided this evidentiary quandary by waiting until a settlement was final before relying on Bankcard's word that converting certain accounts would be OK. Nonetheless, to counter Bankcard's argument that Universal had violated the contract, Judge Duff correctly allowed Universal to explain that it converted accounts because it thought a settlement had been reached.

Rule 408's spirit and purpose must be considered in its application. *Central Soya*, 676 F.2d at 944. *See also Winchester Packaging*, 14 F.3d at 320. The purpose of Rule 408 is to encourage settlements. Settlements will not be

encouraged if one party during settlement talks seduces the other party into violating the contract and then, when a settlement ultimately is not reached, accuses the other party at trial of violating the contract. To use Rule 408 to block evidence that the violation of the contract was invited would be unfair. The need for Universal to explain it thought a settlement had been reached allowing it to roll over accounts--without allowing any details about the settlement talks or even use of the word "settlement"--outweighed any potential for discouraging future settlements and did nothing to undermine the purpose and spirit of Rule 408. The admission of Rothberg's testimony that touched on settlement negotiations was not, in our view, grounds for ordering a new trial.

The third reason Judge Posner gave for ordering a new trial involved the jury instructions on the RICO claims. Over Bankcard's objection, Judge Duff's RICO jury instructions included a list of 37 alleged predicate acts; the jury had to find that Bankcard committed at least 2 of these acts for a RICO violation. Jury instructions, of course, must have evidentiary support. *See Quercia v. United States*, 289 U.S. 466, 470 (1933); *United States v. James*, 819 F.2d 674, 675 (7th Cir. 1987). And predicate acts must be indictable activities. *See Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992). For a mail and wire fraud RICO violation to exist there must have been intent to defraud. *See R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1512 (N.D. Ill. 1990); *Robinson v. City Colleges of Chicago*, 656 F. Supp. 555, 558 (N.D. Ill. 1987). Some of the 37 predicate acts lacked any evidentiary support. Other predicate acts, such as placing a

telephone call to solicit business or filing a lawsuit, did not charge an action that is indictable under RICO. On only the first of the 37 predicate acts did Judge Duff instruct the jury that the particular act had to have been done with an intent to defraud to qualify as a predicate act. These were serious errors that, in light of the shaky RICO evidence to begin with, cannot be deemed harmless. *See Stutzman v. CRST, Inc.*, 997 F.2d 291, 294 (7th Cir. 1993). Judge Posner certainly made the right call when he ordered the RICO claims to be retried.

Because the RICO instruction error at the first trial affected only the RICO claims, however, the new trial should have been limited to that part of the case. Partial trials are proper if the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *McClain*, 139 F.3d at 1128, citing *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). The danger of spillover prejudice from the erroneous RICO instruction onto the breach of contract claim was minimal. The RICO evidence at the first trial consisted mostly of testimony from other business people who experienced problems with Bankcard, while the breach of contract evidence involved business records and testimony from Universal's officials. Whether Bankcard breached the contract by bollixing up application approvals and shafting Universal on residuals is a very different question from whether Bankcard engaged in a pattern of racketeering. The fact that a jury could hear evidence on both issues and still keep the issues separate was borne out at the second trial, where the jury found again that Bankcard breached the contract but had not violated RICO.

After the jury at the second trial determined that Bankcard had breached the contract to the tune of $4.1 million, Judge Posner nullified the verdict and entered judgment for Bankcard, concluding that the evidence of damages was insufficient. Because the sufficiency of the evidence on the amount of contract damages at the first trial was *not* one of the reasons given for ordering the second trial, we deal with this issue only briefly.

Craig Millington, a former MasterCard® International executive who later became one of Universal's top managers, testified at the first trial that Universal placed at least 1,100 new merchant accounts with Bankcard for which Universal received no residuals. Millington estimated that each account would have generated about $250 in revenue for Universal per year, which means that Universal should have received $275,000 in residuals for those accounts in the first year alone. Millington testified that Universal's sales force peaked at 110 individuals, that each of those sales personnel could be expected to drum up 75 new accounts per year, and that it cost Universal $4,000 per year to keep each salesperson in the field. Millington also testified that each new account would generate a one-time $500 equipment installation profit for Universal. Finally, Millington testified that Universal had plans to add 50 new sales people per year, who would generate more new accounts and more profits on top of the residuals being produced by accounts signed up in previous years. At closing, Universal's counsel urged the jury to multiply 110 salespeople times 75 new accounts per year times $250 in residuals per year ($2,062,500), minus 110 salespeople times $4,000 in annual costs ($440,000), for a total annual lost profit of

$1,622,500 in the first year. By factoring in the $500 one-time profit for each new account and the optimistic growth projections for later years, Universal's counsel threw out breach of contract totals as high as $13.8 million and $25.6 million.

It is true that Universal's evidence of its costs was sketchy. Certainly, the cost of running this operation had to amount to more than $4,000 per salesperson. That estimate does not appear to account for the costs incurred by Universal's central office, such as Millington's $75,000 salary. On the other hand, Bankcard was not Universal's only business partner, and it is difficult for any business to prorate general overhead costs between different lines of business. Under Illinois law, which governs the breach of contract question, *complete* speculation regarding lost profits is unacceptable. *Oakleaf of Illinois v. Oakleaf & Assoc., Inc.*, 527 N.E.2d 926, 933 (Ill. App. 1988). Damage awards cannot be based on conjecture or speculation, but absolute certainty or mathematical precision about lost profits is not required. *Id.* Plus, Illinois courts are reluctant to interfere with the discretion of the jury in its finding of fact regarding damages. *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 672 N.E.2d 341, 348 (Ill. App. 1996). Universal's suggestion that it lost $13 million to $25 million seems to have been based on conjecture and speculation, but the jury did not buy those rosy projections. Though there was not mathematical precision, there was evidence on which the jury could be reasonably certain about a more modest damages award. Universal's evidence of $1,115,000 in damages was scant, although we believe sufficient, at the first trial.

Universal goes on to allege that it was prejudiced when Judge Posner committed errors during the second trial on the RICO count. In particular, Universal says the judge erred when he compressed the 37 alleged RICO predicate acts into 3 general categories and when he instructed the jury. We have examined these claims, and not only do we find them meritless, we believe Judge Posner was absolutely right in whittling Universal's blunderbuss approach down to something that was much more understandable for the jury. Also, we believe the challenge to his instructions to the jury is meritless. In short, after reviewing the record, we conclude that Judge Posner conducted an error-free second trial and that Universal's bag of alleged errors is without substance.

So we come to the final score. Although Universal does not leave with either of its touchdowns after our replay, it at least gets the equivalent of a field goal. We affirm Judge Posner's grant of a new trial on the RICO claim but reverse his grant of a new trial on the breach of contract claim following the first trial. We affirm the jury's verdict rejecting Universal's RICO claim at the second trial. We hold that the second trial on the breach of contract claim, considering our reinstatement of the verdict the first time around, was a nullity. Finally, the contract between Universal and Bankcard provides that in the event of disputes, the prevailing party is entitled to attorneys fees. As we see it, there is no true prevailing party in this case. Universal clearly overreached, and we do not view it as the prevailing party based on the unusual circumstances of this protracted litigation. Though Universal is now getting something rather than nothing, what it is netting is only a pittance of the $25.6

million it asked the first jury to award on the breach of contract claim. Accordingly, we believe no attorneys fees or costs should be awarded to either side as a result of the two trials or from the prosecution or defense of this appeal. *See Perlman v. Zell*, 185 F.3d 850, 858-59 (7th Cir. 1999).

To summarize our findings, Universal is entitled to $1.115 million, all from the first judgment on the state breach of contract claim. The $6.69 million that Judge Posner rejected from the first trial's federal RICO judgment remains stricken. The second trial was a nullity on the breach of contract claim and a loss for Universal on the RICO claim. That result is affirmed. No costs or attorneys fees at the district court level or in this court are awarded. The case is remanded to the district court for the entry of an amended judgment.

SO ORDERED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BANKCARD AMERICA, INC.	)	
Plaintiff,	)	
v.	)	No. 93 C 1969
UNIVERSAL BANKCARD SYSTEMS, INC.,	)	
Defendant.	)	

ORDER

POSNER, *Chief Circuit Judge,* sitting by designation. The plaintiff, Bankcard America, brought this diversity breach of contract suit against Universal Bankcard Systems, Inc., which counterclaimed under RICO against Bankcard and two of its officers. The details of the dispute are immaterial to this order, and so will not be recited. The case was tried to a jury, which awarded a verdict for Universal that after trebling resulted in a $7.8 million judgment in favor of Universal. Bankcard moved for a new trial. Before the motion (and related post-trial motions) could be ruled on, the district judge who had presided at the trial took early senior status because of a disabling medical condition and was not able to remain on the case. The case was reassigned to me (sitting in the district court by designation) for consideration of the post-trial motions. They have now been fully, indeed exhaustively, briefed, and are ripe for decision.

The motion for a new trial must be granted because of serious trial errors, as follows.

1. At the conclusion of the trial, Universal transmitted a number of exhibits to the jury room for use in the jury's deliberations. Twenty-four of these documents had not been admitted into evidence, and a number of these contained statements prejudicial to Bankcard. Universal contends that a lawyer for Bankcard stipulated to the admission of these documents. The lawyer had done this in response to oral assurances by Universal's lawyers, which were incorrect, that the documents had been admitted into evidence. When the lawyer discovered his mistake and brought it to the attention of Universal, Universal reiterated its assurances; and by the time Bankcard received the transcript of the trial and was able to verify the mistake, the jury had returned its verdict. Universal has filed affidavits that counter some of the allegations in the affidavit of Bankcard's lawyer, but that do not deny the central allegations: that the documents had never in fact been admitted, and that they contained prejudicial material. Although Bankcard's lawyer might have been faster on the draw, I do not think that he was guilty of culpable negligence in stipulating to the admission of the unadmitted documents; nor did the district judge give him an adequate opportunity to explain the mistake and seek to correct it before the jury retired for its deliberations.

2. The trial judge, over Bankcard's objection, appended to the RICO instruction a list of 37 predicate acts; the jury had to find that Bankcard had committed at least two of these in order to find a RICO violation. The majority of the 37 alleged predicate acts either had no

evidentiary support, did not charge a crime that RICO makes a predicate act, or failed to instruct on an essential element of the crime (usually intent).

3. The trial judge allowed testimony regarding settlement negotiations, in violation of Fed. R. Evid. 408.

The case was not so one-sided that this cascade of errors can be dismissed as harmless. There were other errors as well but as they are unlikely to recur at a new trial before a different judge, there is no need to discuss them. I deny Bankcard's other post-trial motions, in particular its motion for judgment notwithstanding the verdict. Bankcard argues that the evidence is insufficient to show a RICO violation. Although the evidence is weak, I am not convinced that it is so weak as to warrant the entry of judgment in Bankcard's favor.

I shall schedule a pretrial conference to make the necessary arrangements for the new trial.

/s/ Richard A. Posner
Richard A. Posner,
Chief Circuit Judge

Dated: December 15th, 1997

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 2000

Before

Hon. Harlington Wood, Jr., *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

Nos. 98-2528, 98-2529 & 98-2530

BANKCARD AMERICA, INC.,
Plaintiff-Appellee /Cross-Appellant,

v.

UNIVERSAL BANCARD SYSTEMS, INC.,
Defendant-Appellant /Cross-Appellee,

and

SAMUEL BUCHBINDER and PAUL ALPERSTEIN,
Counter-Defendants /Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 93 C 1969

Richard A. Posner, Chief Circuit Judge Sitting by Special Designation.

ORDER

Bankcard America, Inc. and Universal Bancard Systems, Inc. have each petitioned for rehearing. In addition, Bankcard has petitioned for rehearing en banc. All judges on the original panel have voted to deny the petitions for

rehearing. No judge[1] in active service has requested a vote on the petition for rehearing en banc. Accordingly, all pending petitions are denied.

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[1] Chief Judge Posner did not participate in the consideration of these petitions.

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGMENT IN A CIVIL CASE

Bankcard America
vs
Universal Bankcard

CASE NUMBER: 93 C 1969

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Judgment is entered in favor of counterplaintiff Universal Bankcard Systems Inc and against counterdefendant Bankcard America Inc on Universal's breach of contract counterclaim in the amount of $1,115,000. Judgment is entered in favor of counterplaintiff Universal and against counterdefendants Samuel Buchbinder in the amount of $1,115,000 and against Paul Alperstein in the amount of $1,115,000 on Universal RICO's counterclaim. As provided by the statute each of those amounts are trebled and judgment is entered against Mr. Buchbinder in the amount of

$3,345,000 and Mr. Alperstein in the amount of $3,345,000.

January 31, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Illegible
(By) Deputy Clerk

AGREED RICO JURY INSTRUCTION GIVEN AT THE FIRST TRIAL

8.1 UNIVERSAL has brought claims against counter-defendant SAMUEL BUCHBINDER and PAUL ALPERSTEIN for alleged violations of the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, commonly referred to as RICO. Specifically UNIVERSAL claims that each defendant, SAM BUCHBINDER AND PAUL ALPERSTEIN, violated section 1962(a), (b), (c) and (d) of RICO.

UNIVERSAL must establish by a preponderance of the evidence every element of a RICO claim. You should consider each and every element of a RICO cause of action only in the precise way that I will define them in these instructions. You must avoid confusing any of the elements of a RICO claim with your prior conception of the meaning of the terms that are used to describe the elements of a RICO claim.

I. Section 1962(a)

UNIVERSAL has alleged that each counterdefendant violated Section 1962(a) of the RICO Act. To establish that a counter defendant violated Section 1962(a), UNIVERSAL must prove by a preponderance of the evidence each of the following four elements:

1. That there was an "enterprise"

2. That the enterprise engaged in or had some effect "on interstate commerce";

3. That BUCHBINDER and ALPERSTEIN derived income, directly or indirectly, from a "pattern of racketeering activity, and

4. That some part of that income was used in acquiring an interest in or operating the enterprise.

A "person" under the law includes but is not limited to any person or entity that is capable of holding a legal or beneficial interest in property. A corporation is a legal entity that, like a person, is capable of holding a legal or beneficial interest in property.

The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity. An enterprise "affects interstate or foreign commerce" if the enterprise either engages in, or has an effect on commerce between the states or between the states and foreign countries.

A "racketeering activity" means an act in violation of the federal mail fraud, the federal wire fraud, or the federal bank fraud statutes. You will be instructed on the law pertaining to these statutes to guide you in determining whether the plaintiff proved by a preponderance of the evidence that BUCHBINDER and/or ALPERSTEIN committed one or more violation of these statutes. A "racketeering activity" may also be referred to as a "predicate offense."

A "pattern of racketeering activity" requires that UNIVERSAL prove that BUCHBINDER and/or ALPERSTEIN committed at least two acts of "racketeering activity" within ten years of each other. The proof of two or more predicate acts does not in and of itself establish a

"pattern" under RICO. The two acts need not be of the same kind. For example, the acts may be one act of mail fraud and one act of wire fraud. However, you must find by a preponderance of the evidence that the two acts occurred within the time specified and that each was connected with the other by some common scheme, plan or motive so as to constitute a "pattern". A series of wholly separate, isolated or disconnected acts of racketeering activity does not constitute a pattern.

In other words, two or more otherwise unrelated acts of "racketeering activity" do not constitute a "pattern" of racketeering activity under RICO unless the acts all relate to a common scheme by BUCHBINDER and/or ALPERSTEIN to continually conduct the affairs of the alleged enterprise for illicit personal benefit, whether monetary or otherwise, for himself, themselves, or for another, by committing the predicate offenses.

As I instructed you, "racketeering activity" means an act in violation of the mail fraud, wire fraud, and/or bank fraud statutes. However, you may not consider just any racketeering act allegedly committed by BUCHBINDER and/or ALPERSTEIN in violation of one of these statutes as bearing on the question of whether either BUCHBINDER or ALPERSTEIN has committed two or more predicate offenses as a pattern of racketeering activity. In making this determination, you are to consider only those specific racketeering acts alleged by UNIVERSAL against a particular Counterdefendant. Furthermore, you cannot find that the Counterdefendant has engaged in a "pattern of racketeering activity" unless you unanimously agree to which of the alleged predicate offenses,

if any, make up the pattern. Thus, it would not be sufficient if some of you should find that a Counterdefendant committed a violation of two or more predicate offenses under one particular statute as a pattern and the rest of you should find that a Counterdefendant committed a violation of two or more predicate acts under another statute as a pattern. In other words, you may not find that either BUCHBINDER or ALPERSTEIN has engaged in a pattern of racketeering activity unless you [1] find a "pattern" of predicate offenses and [2] find that UNIVERSAL has proved by a preponderance of the evidence that a Counterdefendant committed each of the two or more predicate offenses that you find are necessary to make up the pattern.

You should note that the pattern must be one in which BUCHBINDER and/or ALPERSTEIN has participated as a "principal." Thus, in order to satisfy the second element, UNIVERSAL must prove that either BUCHBINDER or ALPERSTEIN or both were "principals" by showing by a preponderance of the evidence:

1. That each Counterdefendant knowingly and willfully committed, or knowingly and willfully aided and abetted in the commission of two or more alleged predicate offenses that constitute the alleged pattern of racketeering activity, and

2. That each Counterdefendant knowingly and willfully received income derived, directly or indirectly, from that alleged pattern of racketeering activity.

The word "knowingly," as that term has been used in these instructions, means that the action was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully,' as that term has been used in these instructions, means that the action was committed voluntarily and purposely, with the specific intent to do something the law forbids. The action must be done with a bad purpose: either to disobey or disregard the law.

UNIVERSAL has alleged that BUCHBINDER and ALPERSTEIN have committed two or more predicate acts including violations of the mail fraud, wire fraud, and bank fraud statutes. It is your function to decide whether UNIVERSAL has proved by a preponderance of the evidence as to each Counterdefendant whether the Counterdefendant violated any of these three statutes on one or more occasions, if at all. To establish that mail fraud has been committed, UNIVERSAL must prove each of the following by a preponderance of the evidence as to each Counterdefendant so charged:

1. Some person or persons willfully and knowingly devised a scheme or artifice to defraud, or a scheme for obtaining money or property by means of false pretenses, representations or promises, and

2. Some person or persons used the United States Postal Service by mailing or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive. The words "scheme" and "artifice" in the mail fraud statute include any plan or course of action intended to deceive others, and to obtain property by false or fraudulent pretenses, representations, or promises, from the persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of the mail fraud statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A material fact is a fact that would be important to a reasonable person in deciding whether to engage in a particular transaction.

Good faith constitutes a complete defense to mail fraud. Good faith means the actor had a genuine belief that the information which was sent or given was true.

UNIVERSAL must prove by a preponderance of the evidence that one or more of the Counterdefendants knowingly and willfully devised or intended to devise a scheme to defraud which was substantially the same as the one alleged by UNIVERSAL and that the use of the United States Mail was closely related to the scheme in that one or more of the Counterdefendants either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. One causes the mails to be used if he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or if he can reasonably foresee such use.

To establish that wire fraud has been committed, UNIVERSAL must prove by a preponderance of the evidence that the Counterdefendants used the telephone or telegraph for the purpose of executing the scheme to defraud.

To establish wire fraud, it must be found that when the Counterdefendant performed an act, he knew, or reasonably could foresee, that the telephone or telegraph

wires would be used to further a scheme or artifice to defraud.

To establish that bank fraud has been committed, UNIVERSAL must prove by a preponderance of the evidence that the Counterdefendants defrauded a financial institution or that they obtained money, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises.

With respect to the fourth element of Section 1962(a) of the RICO Act--use of income to acquire an interest in, establish or operate an enterprise--you must decide whether a Counterdefendant, directly or indirectly, used any part of the income derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate the alleged enterprise. UNIVERSAL must prove by a preponderance of the evidence that a Counterdefendant, or any of them, invested income in a specific enterprise and that income was acquired through the scheme in which they illegally used the mails, telephone, or telegraph with respect to that particular alleged enterprise.

UNIVERSAL claims that the following is an enterprise which affects interstate or foreign commerce, and that each counterdefendant participated in the alleged enterprise through a separate and distinct pattern of racketeering activity.

UNIVERSAL claims that BANKCARD AMERICA, INC., d/b/a AMERICAN BANKCARD CENTER or AMERICAN BANKCARD CENTER, INC., is a Lead-ISO

in the industry of acquiring merchant accounts and providing service to those accounts. UNIVERSAL further claims that the business operates across state lines and has numerous sub-ISO agreements relating to merchant acquisition and electronic credit card services in various states in the United States. It is this business which UNIVERSAL claims is an enterprise which affects interstate or foreign commerce. UNIVERSAL further claims that BUCHBINDER and ALPERSTEIN each participated in that enterprise through a separate and distinct pattern of racketeering activity.

II. [Section 1962(b)]

UNIVERSAL also claims that the Counterdefendants BUCHBINDER and ALPERSTEIN have violated Section 1962(b) of RICO. To establish a violation of Section 1962(b), UNIVERSAL must prove by a preponderance of the evidence each of the following four elements:

1. That an enterprise existed;

2. That the enterprise engaged in or had some effect upon interstate or foreign commerce;

3. That the Counterdefendants engaged in a pattern of racketeering activity; and

4. That through the pattern of racketeering activity the Counterdefendant acquired or maintained an interest in, or controlled the alleged enterprise.

I have already instructed you about the first three elements of Section (b) in the previous discussion of Section (a). If you find that the alleged enterprise existed and engaged in or had some effect upon interstate or

foreign commerce, and that any Counterdefendant engaged in a pattern of racketeering activity, then you must consider the fourth element.

This fourth element that UNIVERSAL must prove by a preponderance of the evidence is that the Counterdefendants, or any of them, through a pattern of racketeering activity, acquired or maintained an interest in, or control of one or more of the alleged enterprises. To find that UNIVERSAL established this fourth element, you must find by a preponderance of the evidence not only that the Counterdefendants, or any of them, had some interest in or control over one or more of the alleged enterprises, but also that this interest or control was associated with or connected to the pattern of racketeering activity.

III. Section 1962(c)

UNIVERSAL has also alleged that BUCHBINDER and ALPERSTEIN have violated Section 1962(c) of RICO. To establish that the Counterdefendants have violated Section 1962(c), UNIVERSAL must prove each of the following five elements by a preponderance of the evidence:

1. That an "enterprise" existed;

2. That the enterprise engaged in, or had some effect upon, interstate or foreign commerce;

3. That the Counterdefendant, was employed by or associated with the alleged enterprise;

4. That the Counterdefendant, was knowingly and willfully conducted or participated, directly or indirectly, in the conduct of the affairs of the alleged enterprise; and

5. That the Counterdefendants, did so knowingly and willfully through a pattern of racketeering activity.

"Employed by or associated with" means some minimal association with the alleged enterprise. The Counterdefendant must know something about the alleged enterprise's activities as they relate to the racketeering activity.

The fourth and fifth elements require that UNIVERSAL prove by a preponderance of the evidence that a Counterdefendant knowingly and willfully conducted or participated in the conducting of the affairs of the alleged enterprise through a pattern of racketeering activity. UNIVERSAL must prove by a preponderance of the evidence a sufficient connection between the enterprise, the Counterdefendant, and the alleged pattern of racketeering activity. In order to establish a sufficient connection between the enterprise, the Counterdefendant, and the alleged pattern of racketeering activity, UNIVERSAL must prove by a preponderance of the evidence:

1. That the Counterdefendant participated in the operation or management of the enterprise itself in such a way, directly or indirectly, as to have played some part in directing the affairs of the enterprise.

2. That the Counterdefendant in fact engaged in the pattern of racketeering activity as UNIVERSAL claims;

3. That the Counterdefendants association with or employment by the enterprise facilitated the commission by either or both of them of the racketeering acts; and

4. That the commission of these predicate acts had some direct or indirect effect on the alleged enterprise.

A person does not violate the law by merely associating with or being employed by an otherwise lawful enterprise the affairs of which are being conducted by others through a pattern of racketeering activity in which he is not personally engaged.

IV. Section 1962(d)

UNIVERSAL also claims that BUCHBINDER and ALPERSTEIN violated Section 1962(d) of RICO because the Counterdefendants agreed or conspired to violate the RICO law.

A "conspiracy" in this sense is a combination or agreement of two or more persons to join together to accomplish an offense which would be in violation of Section 1962(a), (b), or (c) under the law that I have given you with respect to those sections.

To establish a violation of Section 1962(d), UNIVERSAL must prove by a preponderance of the evidence:

1. That two or more persons in some way or manner came to a mutual understanding to attempt to accomplish a common and unlawful plan, that is that while being employed by or associated with an enterprise, they engaged in activities which affected interstate or foreign commerce, or conducted the affairs of the alleged enterprise through a pattern of racketeering activity, in the manner charged; and

2. That each Counterdefendant knowingly and willfully became a member of a conspiracy by objectively indicating, through his words or actions, his agreement to

conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity; and

3. That at least one of the conspirators committed at least one overt act during the existence of a conspiracy in an effort to accomplish some object or purpose of the conspiracy.

The definitions and instructions that I gave to you earlier as to "enterprise," "racketeering activity," "pattern of racketeering activity," "conduct through a pattern of racketeering activity" and "engaged in, or the activities of which affect, interstate or foreign commerce" apply here.

In regard to the first element of the claim of conspiracy, the evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods alleged were in fact set forth in the complaint were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. UNIVERSAL is not required to prove that all of the persons charged with being members of the conspiracy were such or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

On the other hand, it is not enough if the evidence shows only that the alleged conspirators agreed to commit the acts of racketeering alleged by UNIVERSAL, without more, or that they agreed merely to participate in the affairs of the same alleged enterprise. Instead, UNIVERSAL must prove by a preponderance of the evidence that the alleged conspirators agreed to conduct or participate in the conduct of the affairs of the alleged enterprise and that they further agreed that their individual participation would be through two or more racketeering acts in furtherance of the affairs of the alleged enterprise. It does not matter that the alleged conspirators participated in the conduct of the affairs of the alleged enterprise through different, dissimilar or otherwise unrelated acts of racketeering activity, so long as the alleged racketeering acts would, if they were actually committed, create a "pattern of racketeering activity" as I defined that phrase to you.

As to the second element of the alleged conspiracy violation--knowing and willful membership in the conspiracy--UNIVERSAL must prove by a preponderance of the evidence:

1. That the Counterdefendant knew that the basic object of the alleged conspiracy was conducting the alleged enterprise through a pattern of racketeering activity;

2. That the Counterdefendant knowingly and willfully agreed to personally commit, or aid and abet the commission of at least two acts of racketeering as a "pattern of racketeering activity" as I have defined it; and

3. That the Counterdefendant knowingly and willfully agreed to conduct or participate in the conduct of the affairs of the alleged enterprise through this pattern of racketeering activity.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or without knowledge of the names and identities of all of the other alleged conspirators. If UNIVERSAL proves by a preponderance of the evidence that BUCHBINDER or ALPERSTEIN has knowingly and willfully joined the alleged conspiracy under the three standards I have just set forth, it does not matter that that [sic] the Counterdefendant may not have participated in the earlier stages of the alleged conspiracy or scheme.

However, mere presence at the scene of some transaction or event or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily prove the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

UNIVERSAL need not prove that BUCHBINDER or ALPERSTEIN actually committed any of the acts that either may have agreed to commit in order to establish his membership in the conspiracy. You may consider only those racketeering acts alleged against the particular Counterdefendant by UNIVERSAL in determining whether that Counterdefendant has agreed to commit

two acts of racketeering activities as a "pattern of racketeering activity." These alleged racketeering acts are outlined as to each Counterdefendant in **Exhibit A** at the end of these instructions.

To establish the third element, UNIVERSAL must prove by a preponderance of the evidence that at least one of the alleged conspirators committed at least one "overt act" during the existence of the alleged conspiracy. An "overt act" is a transaction or event, even one which may be entirely legal and innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. However, you may not consider any evidence of any alleged wrongful act, other than the alleged wrongful act which the UNIVERSAL contends is a specific violation, and as in any way bearing on the character of any Counterdefendant or as an indication that any Counterdefendant may have a propensity to commit any of the offenses charged.

In your consideration of this conspiracy claim, you should first determine whether the alleged conspiracy existed. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the Counterdefendants willfully became a member of that conspiracy.

In determining whether there was a conspiracy you may consider all the evidence in the case. If you find that there was conspiracy then you may attribute the statements or the acts of BUCHBINDER to ALPERSTEIN, and of ALPERSTEIN to BUCHBINDER.

If you find that no such conspiracy existed, then you must find for the Counterdefendants. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

Causation

Finally, for UNIVERSAL to prevail under RICO, it must prove by a preponderance of the evidence that the Counterdefendant's RICO violations were the "proximate cause" of injury to UNIVERSAL'S business or property. Therefore, you must find that UNIVERSAL suffered an injury to its business or property and that the injury was caused by reason of Counterdefendants' violation of RICO.

An injury or damage is proximately caused when the act played a substantial part in bringing about or actually causing injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

A person is injured in his business when he suffers loss of money or profits or a reduction in the value or worth of his business.

A finding that UNIVERSAL was injured in its business or property because of the Counterdefendants' violation of RICO requires only that you find that UNIVERSAL was harmed by the predicate acts.

However, to find that injury to UNIVERSAL'S business or property was caused by reason of the Counterdefendants' violation of RICO, you must find that the injury to UNIVERSAL was caused by, and was a direct result of

the Counterdefendants' violation of Section 1962(a), (b), or (c).

Therefore, you must find that the commission of the acts of racketeering or the pattern of racketeering activity, or the conduct of the affairs of the enterprise through the pattern of racketeering activity directly resulted in the injury or played a substantial role in producing the injury.

In considering the issue of damages, if any, with respect to the RICO claims, you must assess the amount you find justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the damages to UNIVERSAL in its business or property. Damages may not be based on speculation because it is only actual damages (what the law calls compensatory damages) that you are to determine.

You should consider the amount of damages, if any, as to each Counterdefendant with respect to each RICO claim separately and independently from the amount of damages, if any, with respect to any other non-RICO claims. For example, if you determine that damages should be awarded to UNIVERSAL under its RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award to UNIVERSAL under its breach of contract claim.

EXHIBIT A: PREDICATE ACTS

Counterplaintiff UNIVERSAL BANCARD SYSTEMS, INC. has alleged the following events to be predicate acts to establish the pattern of racketeering activity through a criminal enterprise (BAI) in support of the scheme of BUCHBINDER and ALPERSTEIN to defraud UNIVERSAL and others of money and property.

1. In or about November 1986, Sam Buchbinder in Illinois placed a phone call to Jeff Corbin of World Check Control in California to advise Corbin of his interest in having Paul Hook's company, Merchant Services Group, to become a sub-ISO and BAI, with the intent to induce Hook and Merchant Services Group to solicit merchants, and thereafter, in furtherance of Buchbinder's and Alperstein's fraudulent scheme, to misappropriate the income stream from those merchant accounts.

\2. In or about January 1987, Sam Buchbinder in Illinois spoke by phone with Paul Hook in California to convince Hook to become a sub-ISO with BAI d/b/a ABC.

3. In or about January 1987, Paul Alperstein in Illinois placed several phone calls to Hook in California to arrange a personal meeting in order to induce Hook to become a sub-ISO with ABC.

\4. Throughout February of 1987, Sam Buchbinder in Illinois transmitted, by fax and U.S. Mails, drafts of a proposed Independent Sales Organization contract to Hook in California.

\5. In April 1987 Buchbinder and Alperstein mailed or caused to be mailed to Hook a residual check in the amount of $29.00 and a handwritten list of 14 accounts, all purporting to represent residual

incomes for February 1987, when in actuality a far greater sum was due to Merchant Services Group.

6. In April 1987, Buchbinder from Illinois, knowing that his representations were false, called Hook in California to advise Hook that there were legitimate reasons for delays in approval and payment, when in fact there were no such legitimate reasons.

7. Between April and May, 1987, Buchbinder and Alperstein in Illinois falsely advised Hook in California that they were exerting best efforts to resolve problems with approvals from Rocky Mountain, when in fact the delays were part of Buchbinder's and Alperstein's scheme to weaken and destroy Merchant Services Group by depriving it of the income stream it would have derived if approvals had been forthcoming.

\8. On or about May 27, 1987, Sam Buchbinder, from his office in Illinois, spoke by phone with Paul Hook, in California, and falsely represented to Hook that he had 145 merchant applications, and fraudulently induced Hook to send him by Federal Express a cashier's check for approximately $9,000, in return for which Buchbinder would federal express machines to Hook for the carrying on of his business; Buchbinder made these representations knowing they were false and with the intent to deceive Hook, who, relying on the false representation, sent the $9,000, to his detriment.

9. From February to June 1987, Buchbinder and Alperstein caused the processing bank to transfer electronically via telephone from merchant terminals in California to the processing bank in Colorado and ultimately to a bank account used by Buchbinder and Alperstein.

10. From February to June 1987, Buchbinder knowingly and with the intent to defraud, communicated by phone on several occasions with Hook, misinformed Hook that delays in payment of residuals were caused by delays in the processing bank.

11. In or about June 1987, as a part of their scheme, Buchbinder and Alperstein caused their attorneys to file a complaint in the U.S. District Court against Merchant Services Group, Inc., which contained knowingly false factual representations. It was Buchbinder's and Alperstein's intent to use litigation as a weapon against the ISO, and thereby to secure the Court's blessing on their fraudulent scheme, and to secure an adjudicated right to ownership of the residuals from merchant accounts placed on line by Merchant Services.

12. In or about April 1987, Buchbinder in Skokie, IL, spoke by phone with Roger Baer in California to begin the process of inducing Baer and his company to enter into an Independent Sales Organization agreement with ABC.

13. In or about April 1987, Buchbinder in Skokie, IL, placed a call to Baer in California to set up a meeting to finalize a sub-ISO agreement.

\14. Throughout April 1987, Buchbinder and Baer communicated by phone, fax, and mail, transmitting letters and drafts of a sub-ISO agreement.

\15. Throughout April and May, 1987, Buchbinder faxed and mailed to Baer and Western Bankcard various drafts of a sub-ISO agreement.

\16. From June 1987 to February 1988, Buchbinder and Alperstein cause the processing bank to transfer electronically via telephone monies from Baer's merchant accounts in California to the processing

bank in Colorado, and in turn to a bank used by Buchbinder and Alperstein.

\17. From June 1987 to February 1988, Buchbinder, knowing that his representations were false and with the intent to deceive Baer in order to misappropriate residual income from merchant accounts sold by Western Bankcard, spoke on various occasions by phone with Baer, misleading him into believing that the delay in payment of residuals were caused by the processing bank.

18. In or about July 1988, Buchbinder and Alperstein caused their attorneys to file a complaint in the U.S. District Court against Western Bankcard Center, Inc., and in the complaint made false representations, known to be false when they were made, and made in furtherance of the scheme of Buchbinder and Alperstein to misappropriate the residuals of Western Bankcard Center, Inc.

19. In or about April 1988, Buchbinder in Illinois spoke by phone with Glenn Francis in California on the subject of inducing Francis and his company Electronic Bankcard Services, to become a sub-ISO for BAI.

20. In 1988, Buchbinder spoke by phone at least three times with Francis about a sub-ISO relationship.

21. Throughout 1989, Buchbinder from Illinois made several more phone calls to Francis, advising him that Buchbinder was interested in having Francis and his company be a sub-ISO with ABC.

22. In April 1990, Buchbinder again spoke by phone with Francis about the potential business relationship.

\23. During April and May, 1990, Buchbinder communicated with Francis via telephone, fax, and U.S.

Mail, concerning entering into a contractual relation with Francis; documents were faxed and mailed in furtherance of the scheme of Buchbinder and Alperstein to entice sub-ISO's into a business relationship in order to misappropriate the residuals from any merchant accounts placed on line by the sub-ISO.

24. During April and May, by means of phone, fax, and mail, Buchbinder and Alperstein falsely represented to Francis that they wanted to enter into a legitimate business relationship.

\25. From May to August, 1990, Buchbinder and Alperstein caused the processing bank to transfer electronically, via telephone, funds from each and every account placed by Francis, from banks in Massachusetts and California to a bank in Illinois, and in turn to a bank account used by Buchbinder and Alperstein.

26. Each month from May to August 1990, Buchbinder spoke by phone with Francis and told him, knowing that what he was saying was false, that delays in processing approvals were caused by the processing bank.

27. In or about April 1992, Buchbinder and Alperstein caused their attorneys to file a complaint in the Circuit Court of Cook County against Francis. The complaint contained false representations made with the intent to secure a default judgment and thereby give them a legal right to the income stream from the merchant accounts placed on line by Francis.

\28. On September 10, 1991, Sam Buchbinder and Paul Alperstein for BAI, both in Skokie, Illinois, spoke by phone with Rick Rothberg of UNIVERSAL in

Melville, NY, to discuss UNIVERSAL'S possible participation as an ISO on behalf of BAI.

29. During September 1991, Buchbinder spoke by phone several times to Rothberg and to Craig Millington in furtherance of having UNIVERSAL become a sub-ISO of ABC.

\30. On September 17, 1991, Paul Alperstein in Illinois faxed to Rick Rothberg in New York a copy of a proposed sub-ISO agreement.

\31. On September 17, 1991, Paul Alperstein and Sam Buchbinder, in Skokie, IL, mailed to Rich Rothberg in New York a draft copy of a proposed ISO agreement.

\32. Throughout September 1991, Buchbinder, by fax and mail, transmitted drafts of a proposed Independent Sales Organization contract to Rothberg; the draft was part of a fraudulent scheme to induce Rothberg and Universal to enter into a contract, in order that Buchbinder and Alperstein would be able to find or manufacture one or more pretexts for terminating the agreement with cause, and so to misappropriate the residual income due to UNIVERSAL from the merchant accounts which UNIVERSAL placed on line with BAI d/b/a ABC.

\33. From October 1991 to March 1993, Buchbinder and Alperstein caused the processing bank, via telephone, to transfer funds from each and every account placed by UNIVERSAL from merchant terminals in New York to the processing bank, and from there to a bank used by Buchbinder and Alperstein.

\34. From September 1991 to March 1993, Buchbinder and Alperstein mailed residual reports to Rothberg, knowing that the reports were false.

\35. On or about March 30, 1993, Buchbinder and Alperstein caused their attorneys to write a letter to Rothberg, purporting to terminate the contractual relationship, but failing to adhere to the terms of the contract in so doing. The representations made in the letter were false and were known to be false at the time they were made.

\36. On or about April 1, 1993, Buchbinder and Alperstein caused their attorneys to file a complaint against UNIVERSAL in the U.S. District Court; the complaint contained factual misrepresentations, known to be untrue when they were made. The suit was part of a scheme on the part of Buchbinder and Alperstein to misappropriate for themselves the income stream from merchant accounts.

\37. On or about April 1995, without notice to the Court, or to UNIVERSAL pursuant to a continuing obligation to disclose material and relevant information relating to the suit, sold to a company in which Buchbinder and Alperstein both held ownership interests, namely PMT, all of the residual income stream from merchant accounts place [sic] on line by UNIVERSAL under agency numbers 107, 169, and 156.